17251

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 181.

LUTHER B. YAPLE, TRUSTEE IN BANKRUPTCY OF HANNAH L. WELTNER, DOING BUSINESS AS HANNAH L. WELTNER & SON,

vs.

DAHL-MILLIKAN GROCERY COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JANUARY 2, 1903.

(18,769.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 7, 1903.

1 United States Circuit Court of Appeals, Sixth Circuit.

LUTHER B. YAPLE, Trustee in Bankruptcy of Hannah L. Weltner, Doing Business as Hannah L. Weltner and Son, Appellant, vs. DAHL-MILLIKAN GROCERY COMPANY, Appellee.	No. 1092. Appeal from the District Court of the United States for the Southern District of Ohio.

This is an appeal from the judgment of the district court reversing the holding of the referee in bankruptcy as to the allowance of a certain claim of the Dahl-Millikan Grocery Company only upon condition of surrendering preferences which the referee found had been received by the said company upon its claim within the four months next preceding the adjudication in bankruptcy.

It appears from the transcript of the record that on the 12th day of October, A. D. 1901, Hannah L. Weltner, doing business as H. L. Weltner & Son, filed her petition in voluntary bankruptcy and was duly adjudged a bankrupt on the 15th day of October, 1901; said matter was referred to the referee in bankruptcy on that day. The first meeting of the creditors of said bankrupt was held on the 28th day of October, 1901, and Luther B. Yaple was selected and duly qualified as trustee. On December 21st, 1901, the Dahl-Millikan Grocery Company, a corporation organized and existing under the laws of the State of Ohio, filed its certain deposition before the referee, asking that its claim in the sum of $764.33 be allowed against said estate, and said claim was so allowed; that afterwards, to-wit, on the 21st day of December, 1901, said Luther B. Yaple, as trustee, filed his petition in the district court, asking that said claim be disallowed and expunged, for the reason that preferences had been received by said claimant, the Dahl-Millikan Grocery Company, and had not been by it surrendered; that said petition of said trustee, by consent of the said Dahl-Millikan Grocery Company who, in writing, waived the issuance of notice and evidenced said
2 consent, came on for hearing before the referee, whereupon it was found and determined by him that said, The Dahl-Millikan Grocery Company, had received preferences as alleged by the trustee in the sum of $101.82 and had not surrendered the same. Wherefore, it was ordered by the referee that the said claim be disallowed and expunged from the records at the expiration of five days next after said December 23rd, 1901, ensuing unless within said last-named period said claimant shall have surrendered the sum of $101.82.

A certain statement of facts was agreed upon by said trustee and said claimant and filed on the 23rd day of December, 1901, which statement is as follows to-wit:

1. That the Dahl-Millikan Grocery Company is engaged in business as jobbers of groceries with its principal place of business at

Washington C. H., Ohio, and has been so engaged for a number of years.

2. That said Hannah L. Weltner, the bankrupt herein, was its customer, and for a considerable period past had purchased groceries from it on open account, upon which she had from time to time made payment by check and cash, which payments had been severally duly credited upon said account as of the time the same were received by said, The Dahl-Millikan Grocery Company, and that the last transactions under such account were on the 25th day of September, 1901.

3. That said Hannah L. Weltner drew checks in favor of said, The Dahl-Millikan Grocery Company on the dates and of the amounts following: June 14, 1901, $70.85; June 24, 1901, $47.09; July 1, 1901, $32.35; July 2, 1901, $75.81; July 9, 1901, $38.50; July 11, 1901, $41.01; July 16, 1901, $40.60; July 30, 1901, $99.59; August 13, 1901, $85.03; August 27, 1901, $81.59; September 10, 1901, $102.23; that said checks were received by said, The Dahl-Millikan Grocery Company, and credited by it on said account on the following dates, respectively: June 17, 1901; June 25, 1901; July 2, 1901; July 3, 1901; July 12, 1901; July 12, 1901; July 18, 1901; August 1, 1901; August 15, 1901; August 28, 1901, and September 11, 1901; that said checks were presented to the bankers of said Hannah L. Weltner, to-wit: Rockhold, Brown & Co., Bainbridge, Ohio, and by them paid and charged to the account of said Hannah L. Weltner on the following dates, respectively: June 21, 1901; June 29, 1901; July 6, 1901; July 9, 1901; July 16, 1901; July 17, 1901; July 22, 1901; August 6, 1901; August 20, 1901; August 31, 1901, and September 17 1901.

4. On September 25th 1901, said Hannah L. Weltner paid
3 to said, The Dahl-Millikan Grocery Company, $40.52.

5. That neither the said, The Dahl-Millikan Grocery Company, nor any agent thereof acting therein did believe, or have any reasonable cause to believe, that it was intended by the payment of said moneys or the giving of said checks, or any of them, to give a preference to it.

6. That said, The Dahl-Millikan Grocery Company, sold and delivered on credit without any security of any kind and without the knowledge of the insolvency of said bankrupt and at her request, goods and merchandise which became a part of her estate on the dates and of the amounts and value following, to-wit: June 25, 1901, $14.74; June 25, 1901, $30.01; June 29, 1901, $25.24; June 29, 1901, $5.20; July 3, 1901, $35.26; July 3, 1901, $59.14; July 10, 1901, $22.24; July 10, 1901, $11.57; July 12, 1901, $5.90; July 12, 1901, $23.59; July 17, 1901, $11.17; July 17, 1901, $38.82; July 30, 1901, $32.24; July 30, 1901, $38.83; July 31, 1901, $56.06; July 31, 1901, $40.32; August 5, 1901, $17.84; August 5, 1901, $10.40; August 14, 1901, $35.19; August 14, 1901, $60.03; August 19, 1901, $17.42; August 19, 1901, $22.56; August 24, 1901, $7.98; August 24, 1901, $38.17; August 28, 1901, $10.65; August 28, 1901, $64.76; August 30, 1901, $25.87; September 10, 1901, $16.62; September

10, 1901, $18.77; September 25, 1901, $33.15; September 25, 1901, $54.38; October 11, 1901, $56.88.

7. That said Hannah L. Weltner drew a check in favor of said, The Dahl-Millikan Grocery Company, on September 25th, 1901, for the sum of $56.88; that said check was received by said payee on September 27, 1901, and the amount thereof was duly credited to her account on said last-named date; that said payee deposited said check with its bankers and the same was forwarded through the ordinary channel for collection to the bankers of said Hannah L. Weltner, Rockhold, Brown & Company, Bainbridge, Ohio, but upon its presentation was not paid by them, because said drawer had no funds on deposit in said bank to her credit, but said check was protested. Upon the return of said check and protest to said payee, to-wit, on October 11, 1901, said sum of $56.88 was charged to the account of said Hannah L. Weltner.

8. That said, The Dahl-Millikan Grocery Company, upon receiving the checks mentioned and referred to in paragraph three of this general statement of facts deposited the same in its general
4 account with its bankers in the city of Washington C. H., Ohio, either on the day on which the checks were severally received or on the day following; that the checks and each of them so deposited were promptly forwarded by the bankers of said, The Dahl-Millikan Grocery Company, through the usual channel for collection, to the bankers of said Hannah L. Weltner on whom said checks were drawn, Rockhold, Brown & Company, Brainbridge, Ohio, and there was no delay nor negligence on the part of said, The Dahl-Millikan Grocery Company, or its bankers, in presenting said checks, or either of them, for payment.

9. That said Hannah L. Weltner was insolvent during the whole of the four months next immediately preceding the date of the filing of her petition in bankruptcy, that is to say, during the whole of the period from June 12, 1901, to October 12, 1901.

Upon these facts the referee found each of said payments to be a preference within the meaning of section 57*g* of the bankrupt act of 1898, but that under section 60c of the same act the creditor has the right to set off subsequent creditors given in good faith without security and stated the account as follows:

1901.	Preferences.	Sub-credits.	Balances.
June 21	$78.58		
June 25		$14.74	
June 25		30.01	
			$78.58 prs.
			44.75 crs.
	Excess of preferences,		33.83
June 29	$47.09		
June 29		$25.24	
June 29		5.20	
July 3		35.26	
July 3		59.14	$80.92 prs.
			124.84 crs.
	Excess of credits,		43.92
July 6	$32.35		
July 9	75.81		
July 10		$22.24	
July 10		11.57	
July 12		5.90	
July 12		23.59	108.16 prs.
			63.30 crs.
	Excess of preferences,		44.86
5			
July 16	$38.59		
July 17	40.01	$11.17	
July 17		38.82	123.46 prs.
			49.99 crs.
	Excess of preferences,		73.47
July 22	$50.60		
July 30		12.24	
July 30		33.82	
July 31		56.06	
July 31		40.32	
July 31		17.92	
Aug. 5		17.84	
Aug. 5		10.40	$124.07 prs.
			188.60 crs.
	Excess of credits,		64.53

1901.	Preferences.	Sub-credits.	Balances.
Aug. 6	$99.59		
Aug. 14		$35.19	
Aug. 14		60.03	
Aug. 19		17.42	
Aug. 19		22.56	$99.59 prs.
			135.20 crs.
	Excess of credits,		35.61
Aug. 20	$85.03		
Aug. 24		$7.98	
Aug. 24		38.17	
Aug. 28		10.65	
Aug. 28		64.76	
Aug. 30		25.87	$85.03 prs.
			147.43 crs.
	Excess of credits,		62.40
Aug. 31	$81.99		
Sept. 10		16.62	
Sept. 11		18.77	81.99 prs.
			35.39 crs.
	Excess of preferences,		46.60
Sept. 17	102.23		
Sept. 25	40.52		
Sept. 25		33.15	
Sept. 25		54.38	$189.35 prs
			87.53 crs
	Excess of preferences,		101.82

The district court reversed the referees' finding and held that the dealings aforesaid between the bankrupt and the creditor
6 should be treated as a single transaction and thus considered there had been no preferences to the creditor within the meaning of section 60*a* of the bankrupt act of 1898, as the creditor had furnished to the bankrupt estate within the four months next preceding the adjudication goods to the amount and value of $104.64 in excess of all payments received during the same period, and consequently the claim of the creditor, appellee, should be allowed in full without requiring any part of the payments received to be surrendered.

This appeal came on to be heard in this court. The court, being in doubt as to how the questions thus raised should be decided, judgment has been reserved until the Supreme Court shall answer

the questions hereinafter submitted. It is accordingly ordered that the foregoing statement be certified to the Supreme Court, together with the following interrogatories:

1. Where a creditor has a claim for a balance due against an insolvent debtor afterwards adjudicated a bankrupt, upon an open account for goods sold and delivered four months before the adjudication in bankruptcy, and during said period makes a number of sales of merchandise on credit to the insolvent debtor which becomes a part of the debtor's estate, and during the same period receives payments of sums on account from time to time, which payments are received in good faith without knowledge of the debtor's insolvency on the part of the creditor, the sales exceeding in amount during said period the payments made during the same time, has the creditor under such circumstances received a preference which he is obliged to surrender before his claim shall be allowed under the bankrupt act?

2. If each of such payments is a preference under the act is it to be set off under section 60c of the act by deducting subsequent sales therefrom, carrying forward to the next payment any excess of preferences, but not of sales, treating any excess of preferences as thus ascertained as a sum to be surrendered before the allowance of the creditor's claim?

HORACE H. LURTON,
WILLIAM R. DAY,
HENRY F. SEVERENS,
Judges of the U. S. Circuit Court of Appeals for the Sixth Circuit, Sitting in said Case.

7 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss:*

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing certificate and statement of facts in the case of Luther B. Yaple trustee etc. *v.* Dahl-Millikan Grocery Co. was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 16th day of December A. D. 1902.

FRANK O. LOVELAND,
Clerk of United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] United States circuit court of appeals for the sixth circuit. Luther B. Yaple, trustee in bankruptcy *v.* Dahl-Millikan Grocery Co. Questions certified to the Supreme Court of the United States

Endorsed on cover: Certificate. File No. 18,769. U. S. C. C. of appeals, 6th circuit. Term No. 181. Luther B. Yaple, trustee in bankruptcy of Hannah L. Weltner, doing business as Hannah L. Weltner & Son, *vs.* Dahl-Millikan Grocery Company. Filed January 2d, 1903.